FILE COPY

DEC 12 '35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 602.

NEW YORK LIFE INSURANCE COMPANY,
Petitioner,

v.

DEMETRIOS P. VIGLAS, Respondent.

RESPONDENT'S BRIEF.

In Opposition to the Petition for a Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

HARRIS J. BOORAS,
Boston,

JOHN A. EDGERLY,
Of Counsel,
Boston,
Attorneys for Respondent.

LAWYERS' BRIEF & PUBLISHING CO.
BOSTON, MASS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 602.

NEW YORK LIFE INSURANCE COMPANY,
Petitioner,

v.

DEMETRIOS P. VIGLAS,
Respondent.

RESPONDENT'S BRIEF.

In opposition to the Petition for a Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

To the Honorable the Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named respondent, respectfully submit the following brief in opposition to the Petition for Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the District Court is not reported. It was filed November 22, 1934, and is found on pages 9 and 10 of the record. The opinion of the Circuit Court of Appeals appears at pages 13 and 19 of the record and is reported in 78 F. (2d) 829.

Additional Facts of the Case.

The facts of the case are substantially set out on pages 3 and 4 of the Petition. The complete statement of all the essential allegations are found in the substitute declaration (R. 3-7).

Respondent respectfully invites the Court's attention to the following important allegations:

The respondent commenced his action on November 9, 1933. Prior thereto, to wit, August 11, September 11, and October 11, 1933, the insurance company refused and failed to pay him the twenty dollars per month benefits due him under the disability clauses of the policy. On August 7, 1933, the company also failed to waive the payment of the semi-annual premium that fell due, and on September 19, 1933, it declared the policy as lapsed on its records.

The declaration further alleges that respondent (plaintiff below) lost the total and irrecoverable use of one hand and one foot—this condition under the policy is recognized to constitute total disability for life (R.23); and further, that the insured is no longer an insurable risk.

Jurisdiction. (Petition P. 2.)

The petitioner's (defendant's) demurrer to the respondent's (plaintiff's) declaration challenged the jurisdiction of

the District Court on the ground that the amount in controversy did not exceed $3000 exclusive of interest and costs.

Although the *ad damnum* in the respondent's writ was $20,000.00, and although the amount sought in good faith in the declaration as damages was about $17,308.00, the District Court, nevertheless, sustained the demurrer and entered judgment for the petitioner.

This judgment has been properly reversed by the Circuit Court of Appeals and the petition for a writ of certiorari should be denied.

As was stated in the case of *Kimel v. Missouri State Life Insurance Co.*, 71 F. (2d) 921:

> "Amount demanded by the plaintiff in petition, when not fictitious or merely colorable but claimed in good faith, and not amount of ultimate recovery, is test for determining whether case involves requisite jurisdictional 'amount in controversy'."

Fair v. Kohler Die & Specialty Co., 228 U. S. 22.

Question Presented. (Petition P. 2.)

The question presented is decidedly different from the one considered by this Honorable Court in the case of *Mobley v. New York Life Insurance Company*, 79 L. Ed. 936. It is as follows:

Where a life insurance company has repudiated its obligation to pay to the insured, who is totally and permanently disabled and who is no longer an insurable risk, benefits due him under the contract, has in fact refused to pay three monthly benefits already due, has failed to waive the payment of premium and has declared the policy *unconditionally* as lapsed: Can the insured treat the contract as ended and maintain one action for the recovery of all damages for the entire value of the contract?

Argument Against the Reasons Advanced for the Granting of the Writ.

1. *As to the ground that "the Circuit Court of Appeals refused to follow the decision of this Court in the Mobley case".*

The pertinent facts stated in this Court's opinion relied on as showing a total breach in the Mobley case (79 L. Ed. 938) are not as petitioner sets them out on page 7 of the petition.

The facts in the Mobley case are set out at length by this Honorable Court in its opinion. They may be summarized as follows:

Mobley became disabled sometime in January, 1931, when the company commenced paying him benefits under two policies. Several times between June 13, 1931, to March 1, 1933, the company concluded that Mobley was not totally disabled, and on each occasion notified Mobley that it would discontinue payments and would not waive premium. But in every instance, on his insistence that he was disabled, the company made further investigation and then changed its ruling, paid past benefits, resumed monthly benefits and waived premiums. On March 1, 1933, the company wrote him that in its opinion he was not totally disabled and that it would not make payments, and that the premium due February 7, 1933, became payable. Mobley replied he would take legal steps. On March 9, company wrote that the matter was receiving further consideration. On same day Mobley demanded $28,980.00 as total breach of the contracts and threatened suit. On March 17, company wrote that it would adhere to its decision not to make further payments. On April 13, company wrote him that one policy lapsed for nonpayment of premiums, and urged Mobley to

apply for reinstatement to protect his interests. On June 5, it advised him that since he had not applied for reinstatement, the company applied the value of the policy to purchase continued insurance until June 20, 1937. On June 9, notice was given him that premium on the other policy would be due on July 9. On July 8, attorney for Mobley wrote to the company that Mobley did not approve of the company's action of June 5. In answer the company wrote that it would give the claim further consideration and a new medical examination was made on July 24. As a result, company concluded that Mobley was totally disabled and on August 9, tendered him $910.00 accrued benefits, and written waiver of premiums. On July 24, suit was begun on one policy, and a few days later on the other. Company pleaded the correspondence and made tender in court. Thereafter, on the 13th of each month, company made payments in court.

On these facts this Honorable Court ruled that there was no repudiation of the entire contract.

In the instant case, as was well said by the Circuit Court of Appeals "the facts alleged are essentially different from those in the Mobley case . . ." (R. 17).

Viglas became totally and permanently disabled on September 11, 1931, and the company paid benefits up to July 11, 1933. On September 1, company notified him it would not make the payment which was due August 11, and that it would not waive the payment of premium due on August 7. Then it failed to make the payment due August 11, September 11, and October 11, and on September 19, it declared the policy as lapsed. Viglas was no longer an insurable risk. On November 9, 1933, he commenced his action for damages.

Here we have no re-examination by the company, no reconsideration of his claim, no tender of the benefits due,

and no offer to waive premiums and reinstate the policy. The lapsation of the policy was *unconditional* and at a time when the insured was totally and permanently disabled and was also not an insurable risk. No honest efforts were made by the company as in the Mobley case. What more should the company do in order to show complete disregard or repudiation of the contract?

The Circuit Court of Appeals followed exactly the opinion of this Court in the Mobley case. (R. 16.)

2. *As to the question of "whether the doctrine of anticipatory breach is applicable to the class of cases to which this one belongs".*

The question presented is not one as in the class of cases referred to as bilateral executory contracts. *Roehm v. Horst,* 178 U. S. 1. Rather it may be stated to be one as to damages recoverable because of the present breach and complete repudiation of an entire contract. (R. 17.)

The case belongs to that class of cases governed by the rule of law which may be stated as follows:

Where time for performance by the defendant has arrived and there is a present breach and a complete repudiation of the entire contract, it warrants the assessment of damages equivalent to the value to the plaintiff of the broken contract.

Pierce v. Tenn. Coal, Iron, etc., Co., 173 U. S. 1.
Lovell v. St. Louis Mutual Ins. Co., 111 U. S. 264.
Dunbar v. Dunbar, 190 U. S. 340.
Central Trust Co. of Ill. v. Chicago Auditorium Ass'n, 240 U. S. 541.
Parker v. Russell, 133 Mass. 74.
Day v. Conn. General Life Ins. Co., 45 Conn. 480.
Indiana Life Endowment Co. v. Reed, 103 N. E. 77.

In the case of *Federal Life Insurance Co. v. Rascoe,* (C. C. A. 6) 12 F. (2d) 693, in which certiorari was denied, 273 U. S. 722, and in which full damages were recovered, the Court said:

> "This is a single contract. The fact that the defendant is required to perform in part at stated intervals does not change its unitary character into a multiplicity of contracts, each relating to but one installment. If there has been an actual breach, coupled with repudiation, of this one contract, then, to avoid a multiplicity of suits, public policy requires that plaintiff may maintain but one action for the entire damages occasioned by such breach."

Millbum v. Royal Union Mutual Life, 234 S. W. (Mo.) 378.

Robbins v. Travellers Insurance Co., 269 N. Y. S. 841.

Equitable Life Assurance Society v. Pool, 71 S. W. (2d) 455.

3. *As to "the matter is one of great practical importance".*

The petitioner argues that unless the opinion of the Circuit Court is reversed, it will mean a great hardship upon insurance companies. What about the great hardship on the insureds in cases like the present, where the companies refuse to make payments and lapse policies? Must the insured be left to pursue his just claim by a multiplicity of suits. Why does not insurer waive premium under protest, or lapse the policy, conditionally, that it may reinstate it in case it discovers its error, if it desires to safeguard itself against one lawsuit for an entire breach?

The matter was just as important in 1926, when the Rascoe case was decided, as it is today, yet in that case—

Federal Life Insurance Co. v. Rascoe, 12 F. (2d) 693 (C. C. A. 6)—this Court denied a petition for a writ of certiorari. See 273 U. S. 722.

4. *As to the decision being contra "to that of the Circuit Court of Appeals for the Tenth Circuit in Kimel v. Missouri State Life Insurance Co., 71 F. (2d) 921." (Petition P. 9.)*

The respondent denies that the decision conflicts with the Kimel case.

In the Kimel case, there was no repudiation. The facts there, show that there was a dispute between the company and the assured as to the interpretation of a clause in the contract. The company claimed it owed less than what assured demanded. Each in good faith insisted on his own interpretation of the contract. The Court said:

> "An offer to perform in accordance with the promissor's interpretation of the contract, although erroneous, if made in good faith, is not such a clear and unequivocal refusal to perform as amounts to a renunciation giving rise to an anticipatory breach."

The decision of the Circuit Court does not conflict with that of any other Circuit Court. It is pursuant to law as laid down by the decisions of this Honorable Court hereinbefore cited.

Wherefore, the respondent respectfully urges that the petition be denied.

Respectfully submitted,

HARRIS J. BOORAS,
Boston,

JOHN A. EDGERLY,
Of counsel,
Boston,
Attorneys for Respondent.